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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket Nos. 96-98, 99-68
	)	
	)	

COMMENTS OF ICG TELECOM GROUP, INC.

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In the Matter of	)	
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Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)))	CC Docket Nos. 96-98, 99-68

COMMENTS OF ICG TELECOM GROUP, INC.

ICG Telecom Group, Inc. ("ICG") hereby files its comments in response to the June 23, 2000 *Public Notice, Comment Sought On Remand Of The Commission's Reciprocal Compensation Declaratory Ruling By The U.S. Court Of Appeals For The D.C. Circuit*, released June 23, 2000 in the above-captioned proceeding (the "*Public Notice*").

INTRODUCTION AND SUMMARY

For the past year and a half the debate over whether ISP-bound traffic should be subject to reciprocal compensation has turned in large measure on the effects of the Commission's *Declaratory Ruling*.[1] There, the FCC held that ISP-bound traffic is interstate traffic and not subject to Section 251(b)(5)'s reciprocal compensation obligation. The argument has thus been over whether ISP-bound traffic is nevertheless sufficiently similar to the local traffic subject to Section 251(b)(5) to warrant similar treatment.

In general, state commissions have held that ISP-bound traffic is similar to local traffic and should therefore be subject to reciprocal compensation. Since the *Declaratory*

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[1] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68*, 14 FCC Rcd 3689 (1999).

Ruling, some 41 states commission decisions have addressed reciprocal compensation for ISP-bound traffic. The great majority have held that ISP-bound traffic should be subject to reciprocal compensation. The state commission decisions fall into two categories. First, and most directly relevant, are those that have been decided in the context of an arbitration proceeding for a new interconnection agreement. To date, 18 states have reached the merits of reciprocal compensation for ISP-bound traffic in this context. 15 have required reciprocal compensation; only three have not. The second category of post-*Declaratory Ruling* state commission decisions are those interpreting existing agreements. Twenty-three state commissions have issued rulings on the merits in this context. Of those, 20 found that reciprocal compensation was required; three did not. Every federal court to review state commission decisions requiring reciprocal compensation for ISP-bound traffic has upheld the decision. However it rules, the Commission must be cognizant of those state commission decisions. They provide both new entrants and incumbents with the certainty that they need

In *Bell Atlantic*, the D.C. Circuit vacated and remanded the *Declaratory Ruling* while at the same time vindicating all of the state commission decisions decided in its wake that held that ISP-bound traffic is subject to reciprocal compensation. While preserving, and providing additional support for, those state commission rulings, the court's decision has also changed the terms of the debate. The court made two things clear that, taken together, necessarily lead to the conclusion that under federal law the Commission is required to summarily order reciprocal compensation for ISP-bound traffic. First, the court held that whether ISP-bound traffic is subject to reciprocal compensation turns on the relevant statutory provisions, *not* the end-to-end jurisdictional analysis engaged in by the FCC. Under this statutory framework, all traffic exchanged by interconnected carriers falls into one of two categories: "telephone exchange service" or "exchange access." If traffic is telephone exchange service, it is subject to reciprocal compensation; if it is exchange access, it is not.

Second, the court's opinion makes clear that ISP-bound traffic is telephone exchange service, not exchange access. Under the logic of the court's opinion and the plain language of the statute no other interpretation is possible. ISP-bound traffic *cannot* be exchange access traffic and therefore must necessarily be telephone exchange service traffic subject to reciprocal compensation.

On remand, the Commission should follow the court's analysis and find that ISP-bound traffic is telephone exchange service and therefore subject to the reciprocal compensation obligation of Section 251(b)(5). *See* Section I below. Such a finding is consistent with a determination that the traffic is jurisdictionally interstate. *See* Section II below.

Alternatively, if the Commission disagrees that ISP-bound traffic is telephone exchange service, it should prescribe the rate for inter-carrier compensation for ISP-bound traffic. It should do so consistent with the principles articulated by ICG in its April 27, 1999 Reply Comments in this proceeding. *See* Section III below.

DISCUSSION

I. ISP-Bound Traffic Is Telephone Exchange Service Subject to Reciprocal Compensation Under Section 251(b)(5) of the Act

A. *Bell Atlantic* Held that Whether ISP-Bound Traffic Is Subject to Reciprocal Compensation Depends Solely on Whether it Is Telephone Exchange Service or Exchange Access

The D.C. Circuit held that the Commission applied the wrong analysis in the Declaratory Ruling. In determining that ISP-bound traffic was not subject to reciprocal compensation under Section 251(b)(5), the Commission engaged in the end-to-end analysis that it has traditionally used to determine the jurisdictional nature of traffic. The court rejected this approach, saying that "[h]owever sound the end-to-end analysis may be for jurisdictional purposes, the Commission has not explained why viewing [ISP-bound calls] as continuous works for purposes of reciprocal compensation." Id. at 7. In other words, the fact that a call to an ISP may be jurisdictionally interstate under an "end-to-end" analysis does not mean that reciprocal compensation is not paid on the call.

The court found instead that the question whether ISP-bound traffic is subject to reciprocal compensation is answered by a straightforward analysis of the applicable statutory provisions. Section 251(b)(5) imposes on all local exchange carriers ("LECs") the "duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C. § 251(b)(5). The Commission has interpreted Section 251(b)(5) to only apply to local traffic—"telephone exchange service" traffic as defined by the Act. Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd 15499, ¶¶ 1033-34 (1996) ("Local Competition Order"). Long distance calls—"exchange access" under the Act—continue to be compensated with access charges, as they were prior to the enactment of Section 251(b)(5). Id.

The court found that the Commission's failure to apply this statutory scheme was reversible error. Bell Atlantic at 8 ("There is an independent ground requiring remand—the fit of the present rule within the governing statute.") (emphasis added). The court was clear that this error alone was a sufficient basis for vacating the Declaratory Ruling, saying that

> [b]ecause the Commission has not provided a satisfactory explanation why LECs that terminate calls to ISPs are not properly seen as "terminating . . . local telecommunications traffic," and why such

> traffic is "exchange access" rather than "telephone exchange service," we vacate the ruling and remand the case to the Commission.

Bell Atlantic at 9. The court's opinion thus makes clear that the question whether ISP-bound traffic is subject to reciprocal compensation turns solely on whether it is telephone exchange service (subject to reciprocal compensation) or exchange access (not subject to reciprocal compensation).

Bell Atlantic leaves no room for the argument that ISP-bound traffic can fall into some category other than telephone exchange service or exchange access. Under Section 251 of the Act, LECs interconnect with requesting carriers to provide one of two types of telecommunications traffic—"exchange access" or "telephone exchange service." 47 U.S.C. § 251(c)(2)(A). As the court observed, the Commission has held that all telecommunications traffic exchanged between LECs must fall into one of the two categories. Bell Atlantic at 8 (telephone exchange service and exchange access "occupy the field").[2]

B. ISP-Bound Calls Are Telephone Exchange Service Calls

With the terms of the debate having been defined by the court, the only question left is into which of the two possible categories—telephone exchange service or

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[2] In the only place in the *Declaratory Ruling* that the Commission addressed the classification of ISP-bound traffic, the Commission stated that enhanced service providers (of which ISPs are a sub-category) are "users of access service," but that it "treated them as end users for pricing purposes." *Declaratory Ruling*, ¶17. The court dismissed this classification of ISP-bound calls as "access service." The court found that

> [i]n a statutory world of 'telephone exchange service' and 'exchange access,' which the [FCC] here says constitute the only possibilities, the reference to 'access service,' combining the different key words from the two terms before us, sheds no light.

Bell Atlantic at 8. Given the Commission's previous finding that all telecommunications traffic is either telephone exchange service or exchange access, there is no room in the statutory scheme for a third category, "access service."

exchange access—ISP-bound traffic falls. The explicit language of the court's decision makes clear that calls to ISPs cannot be exchange access. Thus, under the court's opinion, ISP-bound traffic can only be telephone exchange service traffic. Moreover, the D.C. Circuit's opinion and a recently released opinion by the United States Court of Appeals for the Fifth Circuit both lead to the conclusion that calls to ISPs are telephone exchange service.

1. ISP-Bound Calls Cannot Be Exchange Access and Must Therefore Be Telephone Exchange Service

The *Bell Atlantic* decision makes clear that calls to ISPs cannot be exchange access and must therefore be telephone exchange service. Exchange access is defined by the Act as "the offering of access to telephone exchange services or facilities for the origination or termination of *telephone toll services.*" 47 U.S.C. § 153(16) (emphasis added). Telephone toll service is, in turn, defined as "telephone service between stations in different exchange areas for which there is a separate charge not included in contracts with subscribers for exchange service." 47 U.S.C. § 153(48). Exchange access then is the offering of access for the origination or termination of telephone toll service, which is to say "conventional" long distance calling.

Significantly, the incumbent LECs have urged precisely this view of exchange access in comments filed last fall in the Commission's Advanced Services remand proceeding. The Commission sought comment on whether digital subscriber line ("DSL") based advanced services are telecommunications services. US West, Inc.'s ("US West") responsive comments are typical. US West said that the definition of exchange access turns on whether or not "telephone toll service" is being provided. Comments of US West, CC Docket No. 98-147 (Sept. 24, 1999), 8. According to US West, "[t]he statutory sine qua non of exchange access is that it is used for telephone toll services—defined in the Act as telephone-to-telephone long-distance calling."[3] US West further elaborated on this view in its reply comments saying that "the Act defines 'exchange access' as an access link used specifically 'for the purpose of the origination or termination of *telephone toll services*'—a particular kind of telecommunications service specifically defined in the Act—***not*** for the origination or termination of *telecommunications services* generically." Reply Comments of US West, CC Docket 98-147 (Oct. 1, 1999), 21 (emphasis in original). Thus, in US West's view, "exchange access" is the offering of access only for "ordinary station-to-station telephone toll calls," Id. at 20, and excludes internet access.

Calls to ISPs thus can be exchange access calls only if ISPs are providers of telephone toll service. ISPs, however, cannot be providers of telephone toll service. Telephone toll service providers are providers of telecommunications. As the court observed, ISPs are "information service providers." Bell Atlantic at 6 (citing Federal-State Joint Board on Universal Service, Report to Congress, 13 FCC Rcd 11501, ¶ 66 (1998) ("Universal Service Report")). Information services are "mutually exclusive" with telecommunications services. Universal Service Report, ¶ 59; see also Bell Atlantic at 6 ("Although ISPs use telecommunications to provide information service, they are not themselves telecommunications providers."); Howard v. AOL, 208 F.3d 741, 752 (9th Cir. Mar. 29, 2000) (holding that AOL is an information service provider and thus not a telecommunications carrier). Since ISPs are information service providers, calls to ISPs fall outside the definition of exchange access.

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[3] US West went on to contend that Internet access, whether through a dedicated DSL connection or through a dial-up connection is "information access." *Id.* The Commission and the D.C. Circuit have both made clear there is no such statutory classification applicable to the calls at issue in this proceeding.

Moreover, as the court observed, the Commission itself has said that "'it is not clear that ISPs use the public switched network in a manner analogous to [telephone toll providers.]'" Id. (quoting Access Charge Reform, First Report and Order, 12 FCC Rcd 15982, ¶ 345 (1997)). The court therefore concluded that "ISPs provide information service rather than telecommunications; as such ISPs connect to the local network for the purpose of providing information services, *not originating or terminating telephone toll service.*" Bell Atlantic at 9 (emphasis added).

Accordingly, the dial-up service that LECs provide to callers to reach ISPs is not exchange access. Since all telecommunications calls must be either telephone exchange service or exchange access, ISP-bound calls must therefore be telephone exchange service, and are subject to reciprocal compensation obligations under Section 251(b)(5).

2. ISP-Bound Calls Meet the Criteria for Telephone Exchange Service

Not only does the D.C. Circuit's opinion require a finding that ISP-bound calls cannot be exchange access; it is evident from the court's reasoning that ISP-bound calls are in fact telephone exchange service.

a. Calls to ISPs Meet the Definition of Telephone Exchange Service

Section 153(47) of the Act defines "telephone exchange service" to mean

> (A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service.

47 U.S.C. § 153(47). Under 47 U.S.C. § 153(47)(A), if a call takes place within an "ordinar[y]" local calling area and is covered by the end user's monthly local exchange

service charge, it is a telephone exchange service call. This is the case with ISP-bound calls. As the Commission stated: "[A]n ISP customer dials a seven-digit number to reach the ISP servers *in the same calling area.*" *Declaratory Ruling*, ¶ 4 (emphasis added). The Commission has also "acknowledged the significance of end users being able to place *local*, rather than toll, calls to ISPs, in analyzing, among other things, universal service issues." *Id.*, ¶ n.4 (emphasis added). Thus, calls to ISPs meet the criteria for telephone exchange service.

b. Calls to ISPs Terminate at the ISP

Telephone exchange service is analogous to "local telecommunications traffic" under Section 51.704(b) of the Commission's rules, which is defined as interconnected traffic that "originates and terminates within the same local service area established by the state commission." 47 C.F.R. § 51.704(b). Termination, in turn, is defined as "the switching of local telecommunications traffic at the terminating carrier's end office switch, or equivalent facility, and delivery of such traffic to the called party's premises." 47 C.F.R. § 51.701(d).

The D.C. Circuit found that "[c]alls to ISPs appear to fit this definition: the traffic is switched by the LEC whose customer is the ISP and then delivered to the ISP, which is clearly the 'called party.'" Bell Atlantic at 6 (emphasis added). The court then found that after the call reaches the ISP, the ISP originates a second communication as it sends the end user's data back and forth from the Internet. Id. at 7. In this regard, the court found that ISPs are "no different from many businesses, such as pizza delivery firms, travel reservation agencies, credit card verification firms, or taxicab companies, which use a variety of communications services to provide their goods or services to their customers." Id. at 7 (internal citations omitted). ISPs may differ in that their origination of a second communication "as a result of the end user's call is instantaneous," id. at 6, but that is a distinction without a difference. In the court's view, the ISP's instantaneous origination of a second communication "does not imply that the original communication does not 'terminate' at the ISP." Id. at 7. It is thus clear from the D.C. Circuit's opinion that, while calls to ISPs may be jurisdictionally interstate when viewed end-to-end as a series of linked communications, they nevertheless fall within the telephone exchange service definition because the original telecommunications from the end user to the ISP terminates at the ISP.

The court went on to reject the Commission's argument that "[e]ven if, from the perspective of the end user as customer, the telecommunications portion of the Internet call 'terminates' at the ISPs server (and information service begins), the remaining portion of the call would continue to constitute telecommunications from the perspective of the ISP customer." Id. at 7 (quoting FCC Brief at 41). The court held that [o]nce again . . . the mere fact that the ISP originates further telecommunications does not imply that the original telecommunication does not 'terminate' at the ISP." Id. The court concluded its discussion of the matter by saying that "[h]owever sound the end-to-end analysis may be for jurisdictional purposes, the Commission has not explained why viewing these linked telecommunications as continuous works for purposes of reciprocal compensation." Id. It is thus clear from the D.C. Circuit's opinion that, while calls to ISPs may be jurisdictionally interstate when viewed end-to-end as a series of linked communications, they nevertheless fall within the telephone exchange service definition because the original telecommunications from the end user to the ISP terminates at the ISP.

In a decision released a week after Bell Atlantic, the Fifth Circuit went even further than the D.C. Circuit and directly held that calls to ISPs terminate at the ISP.

Southwestern Bell Telephone Co. v. Public Utility Commission of Texas, 208 F.3d 475 (5th Cir. 2000) ("Southwestern Bell"). The Fifth Circuit had before it a dispute between Time Warner and Southwestern Bell over whether they intended their interconnection agreement's definition of "Local Traffic" subject to reciprocal compensation to include ISP-bound traffic. At issue was whether calls to ISPs "terminate" at the ISP within the meaning of the definition of Local Traffic. Applying the Commission's definition of termination, the court found that "the ISPs are Time Warner's customers, making Time Warner the terminating carrier. So, under the foregoing definition, 'termination' occurs when Time Warner switches the call at its facility and delivers the call to the 'called party's premises,' which is the ISP's local facility." Id. at 486. The Fifth Circuit therefore concluded that "[u]nder this usage, the call indeed 'terminates' at the ISP's premises." Id. (emphasis added).

3. The *Advanced Services Order* Lends No Support to the View that ISP-Bound Traffic Is Exchange Access

The Commission's December 23, 1999 order in its *Advanced Services* proceeding is consistent with the view that calls to ISPs are telephone exchange service calls. *See Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, FCC 99-413, released December 23, 1999 ("*Advanced Services Order*").

In the *Advanced Services Order*, the Commission addressed whether digital subscriber line ("DSL") offerings are telecommunications services subject to the obligations imposed by Section 251(c) as either telephone exchange service or exchange access service. The Commission found that DSL calls to ISPs can be exchange access. *Id.*, ¶ 35. That holding, however, is not applicable to the dial-up calls to ISPs at issue in this proceeding. As the Commission found in an order predating the *Advanced Services Order* in which it addressed the jurisdictional nature of DSL, because DSL is a dedicated connection rather than a circuit-switched call, it is entirely distinct from dial-up Internet access. *GTE Telephone Operating Cos., GTOC Transmittal No. 1148*, 13 FCC Rcd 22466, ¶ 2 (1998) ("*GTE DSL Tariff Order*"). The Commission therefore went out of its way to emphasize that its regulatory approach to DSL has no relevance to whether dial-up calls to ISPs are subject to reciprocal compensation. The Commission was unequivocal that the order

> does not consider or address issues regarding whether local exchange carriers are entitled to receive reciprocal compensation when they deliver to information service providers, including Internet service providers, circuit-switched dial-up traffic originated by interconnecting LECs.

Id. So too the *Advanced Service Order.* The fact that DSL traffic in some applications can be exchange access simply has no bearing on whether dial-up calls to ISPs are exchange access.

Another reason that the *Advanced Services* order is inapplicable is that the DSL line is a dedicated connection to the ISP. Unlike dial-up ISP traffic, two LECs do not need to exchange traffic to facilitate the Internet user's connection with the ISP.[4] By contrast, with dial-up ISP-bound traffic, two LECs often cooperate to provide a connection to the ISP.

II. There Is No Inconsistency in Finding that ISP-Bound Calls Are Telephone Exchange Service and Jurisdictionally Interstate

As discussed above, *Bell Atlantic* makes clear that the determination whether ISP-bound traffic is exchange access or telephone exchange service is separate from the determination of the jurisdictional nature of ISP-bound traffic. Telephone exchange service and exchange access are service categories, not jurisdictional labels. There can be

[4] In this regard, DSL is similar to special access.

traffic that is telephone exchange service (i.e. local service) category that is jurisdictionally interstate. For example, subscribers in Washington, D.C. can place a local call to suburban Virginia or Maryland. Thus, whether ISP-bound traffic is jurisdictionally interstate has absolutely no bearing on whether or not the traffic is local telephone exchange service traffic subject to Section 251(b)(5).

Accordingly, the Commission can find that ISP-bound calls are telephone exchange service and at the same time affirm its determination in the *Declaratory Ruling* that ISP-bound calls are jurisdictionally interstate.

III. If the Commission Finds that ISP-Bound Traffic Is Not Telephone Exchange Service, the Commission Should Prescribe the Rate for Inter-Carrier Compensation for ISP-Bound Traffic

If the Commission finds that ISP-bound traffic is telephone exchange service, its inquiry is at end. As telephone exchange service traffic, ISP-bound calls would be subject to the same symmetrical reciprocal compensation rate applicable to all other traffic subject to Section 251(b)(5)'s reciprocal compensation obligation.

If, however, the Commission declines to find that ISP-bound traffic is telephone exchange service, then the Commission must act to ensure that LECs that terminate another LEC's traffic to ISPs are able to recover the costs they incur in doing so. There is no dispute that terminating LECs incur costs and enable the originating LEC to avoid costs that the originating LEC would otherwise incur. Terminating LECs are thus entitled to be compensated by originating LECs for terminating ISP-bound bound traffic. Commission should therefore set a inter-carrier compensation rate for ISP-bound calls.

In its Reply Comments filed on April 27, 1999 in response to the February 26, 1999 *Notice of Proposed Rulemaking* in this proceeding, ICG articulated a number of principles, broadly supported by the CLEC industry, that the Commission should follow in setting the compensation rate.

A copy of the Reply Comments are attached hereto for the Commission's reference. In brief, the major points are as follows:

1. The compensation rate should not be left to negotiations but should be governed by federal rules. Reply Comments at 2.
2. Rate symmetry should apply to ISP-bound traffic and CLECs should be entitled to rely on ILEC cost studies. *Id.*
3. The compensation rate should be determined on the same basis as the rate for termination of telephone exchange voice traffic, regardless of the jurisdictional nature of the traffic. *Id.*
4. The rate that applies to ISP-bound traffic—where ILECs are net payors—should be the same as the rates that apply in contexts where ILECs are net payees, as this will provide the proper incentive for the ILECs to set their interconnection rates correctly. *Id.* at 2-3.
5. The rate should be a per-minute rate. *Id.* at 3.
6. The rate should be determined based on the ILECs' forward-looking incremental costs. *Id.* at 3.

CONCLUSION

For the reasons shown above, the Commission should find that ISP-bound traffic is telephone exchange service traffic subject to the reciprocal compensation obligation of Section 251(b)(5). If, however, it declines to do so, the Commission should alternatively prescribe the inter-carrier compensation rate for ISP-bound traffic consistent with the principles articulated in ICG's April 27, 1999 reply comments.

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July 21, 2000

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In the Matter of	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	CC Docket No. 96-98
Inter-Carrier Compensation for ISP-Bound Traffic	CC Docket No. 99-68

REPLY COMMENTS OF ICG COMMUNICATIONS, INC.

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April 27, 1999

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Inter-Carrier Compensation for ISP-Bound Traffic	)	CC Docket No. 99-68

REPLY COMMENTS OF ICG COMMUNICATIONS, INC.

ICG Communications, Inc. hereby replies to comments filed in response to the Commission's Notice of Proposed Rulemaking in this proceeding, FCC 99-38, released February 26, 1999.

I. CLEC COMMENTERS BROADLY AGREE ON KEY ISSUES

The comments reflect broad agreement among competitive local exchange carriers ("CLECs") that the following general principles should govern the Commission's treatment of inter-carrier compensation for internet service provider ("ISP") traffic:

1. Because local exchange carriers ("LECs") terminating ISP-bound traffic to an ISP incur costs and enable the originating LEC to avoid costs that the originating LEC would otherwise incur, terminating LECs are entitled to be compensated by originating LECs for the costs that the terminating LEC incurs to terminate such traffic. See, e.g., Comptel at 14; AT&T at 1; CT Cube and Leaco at 2; ICG at 1; MCI at 8-11; Telecommunications Resellers Association ("TRA") at 7-8.

2. The compensation rate should not be left solely to "market-based" negotiations, but should be governed by federal rules. Because an effectively competitive market does not yet exist, and, for terminating traffic, may never exist,[1] federal rules are at least as necessary here as in other aspects of CLEC-ILEC interconnection. See, e.g., Association for Local Telecommunications Services ("ALTS") at 9-10; Comptel at 10-13; TRA at 7-8; CTSI at 11 13; AT&T at 4-6; CT Cube and Leaco at 1-2; GST at 11-14; ICG at 2-3; KMC at 6; MCI at 5-8; RCN at 5-6.

3. Rate symmetry (i.e., the same rate for an ILEC and interconnecting CLECs) should apply to ISP-bound traffic, just as it applies to reciprocal compensation for voice traffic. See, e.g., Comptel at 8, 14-15; AT&T at 9; Cablevision Lightpath at 10; CTSI at 15-16; Focal at 12-13; GST at 16-17; ICG at 10; KMC at 7; MCI at 15-16; RCN at 9-10.

4. The compensation rate should be determined on the same basis as the rate for termination of local voice traffic. Even though much of ISP bound traffic may be jurisdictionally interstate, the traffic is handled by the originating LEC identically to local traffic, incurs costs in the same manner as local traffic, and is priced to end users as if it were local. Therefore, compensation for ISP-bound traffic should be handled in the same manner as for local traffic. See, e.g., Comptel at 2-4; ALTS at 12-13; AT&T at 8-17; Cablevision Lightpath at 7-9; CTSI at 5-6; Focal at 14-17; ICG at 8-10; Intermedia at 3-4; KMC at 6; MCI at 16-17; RCN at 2-3; Sprint at 3-4; Time Warner at 3-9.

5. The compensation rates that apply to ISP traffic – where ILECs are currently net pay*ors* of compensation – must follow a similar structure and methodology to the rates that apply in contexts where ILECs are

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[1] See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, CC Docket Nos. 96-98, 95-185, 11 FCC Rcd 15499, ¶ 1058 (1996) ("Local Interconnection Order"), aff'd in part and vacated in part sub nom. Competitive Telecommunications Ass'n v. FCC, 117 F.3d 1068 (8th Cir. 1997), aff'd in part and vacated in part sub nom. Iowa Utils. Bd. v. FCC, 120 F3d 753 (8th Cir. 1997), aff'd in part and rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd., 119 S. Ct. 721 (1999); Order on Reconsideration, 11 FCC Rcd 13042 (1996); Second Order on Reconsideration, 11 FCC Rcd 19738 (1996); Third Order on Reconsideration and Further Notice of Proposed Rulemaking, 12 FCC Rcd 12460 (1997), further recon. pending.

net payees. This approach will provide ILECs with an incentive to do the Commission's work for it by ensuring that their cost studies accurately reflect economic costs. Local Interconnection Order, ¶ 1058. See, e.g., Comptel at 2-8; AT&T at 15; Cablevision Lightpath at 10; ICG at 9-10; MCI at 19; RCN at 6-7; Sprint at 4-5.

6. The compensation rate should be a per-minute rate, as it is in other analogous situations. If the Commission is going to experiment with alternative, allegedly more "efficient" cost recovery methods, it should not begin by applying a special rate structure solely to situations where ILECs are in the unique position of being net payors. See, e.g., ALTS at 18-19; Comptel at 4-5; AT&T at 16; Focal at 14; GST at 17-18; ICG at 10-11; KMC at 7-8; RCN at 3.

7. The compensation rate should be determined based on forward-looking TELRIC cost studies. Applying identical TELRIC-based rates for ISP and voice traffic will help ensure nondiscrimination and accuracy of cost studies and will simplify administration of inter-carrier compensation. See, e.g., ALTS at 10-12, 14-18; Comptel at 5-8; AT&T at 9; Cablevision Lightpath at 9-10; CTSI at 14; Focal at 9-11; GST at 15-17; ICG at 11-12; Intermedia at 3-4; MCI at 11-12; RCN at 8.

While CLECs are largely in agreement on these general principles, there are some differences in emphasis and approach. ALTS emphasizes state implementation of compensation for ISP-bound traffic, subject to the federal rules governing reciprocal compensation for local traffic; Comptel urges a stronger federal role. For example, as an additional safeguard for competition, Comptel and a number of CLECs -- including ICG -- urge the FCC to require that the ISP compensation rate for any state must not be lower than the proxy rate established in the Local Interconnection Order. See, e.g., Comptel at 16; ICG at 12-13; MCI at 16-18. Not only will this ensure that Principles 1 and 5 above are followed, but it will also encourage net payors of compensation to offer inexpensive broadband access to their customers to avoid having to continue to pay termination charges for dial-up traffic. ICG at 12-13.[2]

Comptel and others also propose that Section 208 complaint processes, including accelerated docket procedures, be available to enforce LECs' compensation obligations. Comptel at 17. ICG agrees that this is an essential safeguard.

ICG strongly agrees with Comptel on the need for a strong federal role in ensuring fair compensation for termination of ISP-bound traffic. Indeed, ICG goes further than many of the commenting parties in contending that the FCC, rather than the states, should establish the compensation rates for ISP-bound traffic and should do so without delay – i.e., without waiting for the results of inter-carrier negotiations. In prescribing rates, the FCC should begin with the presumption that state-approved TELRIC studies provide an appropriate basis for compensation rates. ICG at 11-14. See also CT Cube and Leaco at 2-3; Sprint at 5-6.

ICG's proposal and other CLEC proposals might well produce similar substantive results over time. In ICG's view, however, ICG's proposal has the advantage of speeding up the process to ensure certainty at a relatively early stage as to the prospectively applicable rates for ISP traffic. As noted above, because the market for local service is not yet effectively competitive, ILEC/CLEC negotiations are unlikely to produce a "market" rate. Thus, under a state-implemented negotiation/arbitration approach – even though subject

[2] Another interesting alternative, suggested by Global NAPS, would be to use terminating switched access rates as a benchmark for the inter-carrier compensation rate for ISP traffic. Use of this rate would provide an incentive for ILECs to submit accurate cost studies because the rate for ISP inter-carrier compensation, where the ILECs are currently net *payors*, would be set no lower than the rate for terminating access, where the ILEC is a *payee*.

to strong federal rules as advocated by Comptel – in all likelihood the rate applicable to ISP-bound traffic would not be known with certainty until the conclusion of the negotiation and/or arbitration period. As a result, there would be a relatively long period of uncertainty regarding the rate prospectively applicable to ISP compensation.

Under ICG's approach, the rate would be known as soon as the FCC completes its prescription proceeding. Indeed, if the Commission adopts ICG's proposal to make the existing state approved-rates presumptively applicable on a prospective basis to ISP-bound traffic, the presumptive rate would be known as soon as the FCC issues its report and order in this rulemaking. Therefore, while Comptel's approach appears workable, and is likely to produce similar substantive results, federally prescribed rates as advocated by ICG would provide greater certainty and a more efficient ratemaking process. See also Sprint at 5-6.

II. ILEC "MEET-POINT BILLING" AND NON-COMPENSATION PROPOSALS ARE WITHOUT MERIT

A. Inter-Carrier Compensation Should Follow the End User Pricing Model That Is Applicable to ISP Calls

The ILEC commenting parties generally argue that, because the FCC has concluded that ISP traffic is largely interstate in nature, it follows that compensation for such traffic must be based on the dominant regulatory model applicable to interstate LEC services, i.e., access charges. Accordingly, some of the ILECs urge the Commission to adopt a "meet point billing" model based on access charges – which, as framed by the ILECs, means that the *originating* carrier is entitled to be compensated by the *terminating* carrier, instead of the other way around. BellSouth at 7-9; SBC Communications, Inc. at 22-23; U S West

9-12. Other ILECs argue that a "bill-and-keep"[3] model should be applied, in which no inter carrier compensation is paid. Ameritech at 2; Bell Atlantic at 6. GTE proposes that no inter-carrier compensation should be paid for 18 months, while the Commission takes one more look at the application of access charges to ISP traffic. GTE at 18-24.

These ILEC proposals are based on the misconception that, because some of the traffic is jurisdictionally interstate, inter-carrier relationships necessarily must be structured in the same way as access charges. The ILEC proposals might be more appealing if ISP traffic were in fact currently subject to interstate switched access charges and treated in other respects like an interstate long distance voice call. If that were the case, then there might be some logic to the argument that inter-carrier compensation should follow the model of access charges for interstate long distance calls. However, as the Commission recently reaffirmed, switched access charges do *not* apply to ISP traffic, nor is there reason to believe that they will apply to such traffic in the future.[4]

The model that *does* currently apply, under the Commission's rules, to the pricing and handling of ISP-bound traffic is the local call model. A dial-up call to an ISP typically uses the same local dialing sequence used for voice calls, and the calling party is typically billed by the originating carrier for such calls to ISPs in exactly the same manner as he or she is billed for local voice calls. Thus, where message units or measured usage rates apply,

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[3] ICG agrees with various parties that "bill and keep" should be allowed *where there is minimal imbalance in traffic between two LECs.*

[4] Thus, the ILECs are arguing in the wrong forum. The Commission has elsewhere decided to maintain the existing pricing structure under which ISPs are treated as end users and are not subject to switched access charges. Access Charge Reform, First Report and Order, 12 FCC Rcd 15982, 16133-34 (1997) ("Access Charge Reform Order"), aff'd, Southwestern Bell Tel. Co. v. FCC, 153 F.3d 523, 542 (8th Cir. 1998).

the calling party is billed for each unit or minute of use. The called party, by contrast, is nowhere billed for local usage. Thus, even though the legal jurisdiction of the call may be interstate, the practical and economic reality is that the call is treated in every other respect like a local call. Determinations of inter-carrier compensation should be based on practical and economic realities, not on legalistic arguments based on the technical jurisdiction of a call.

Given that the call is treated as local, it follows that the terminating carrier should be compensated by the originating carrier in the same manner as for any local call. For the Commission to find that, on calls that are treated as local for all practical purposes, the terminating carrier is not entitled to recover the call termination costs from the originating carrier, would completely overturn the established principles of inter-carrier compensation. Under the Section 251(b)(5) compensation scheme, and under the Commission's 15 year-old access charge scheme, the Commission's rules provide that the terminating carrier is entitled to compensation from the carrier that bills the originating end user – whether that billing carrier is a LEC or an IXC.

As noted by ICG and others (see Principle 6 above), it is especially critical for the Commission to observe consistency in the application of inter-carrier compensation models to ISP-bound traffic, because this is the one area where ILECs currently find themselves, as a result of their own ratemaking and business decisions, in the role of net *payors* instead of their usual role of *payees*. The ILECs now seek to undo the consequences of their apparent miscalculations by convincing the Commission to treat compensation under a "meet point billing" model that does not in fact apply. The Commission should stand firm and require the uniform application of the correct local compensation model to ISP-bound traffic, which is uniformly treated as local.

B. RBOC Claims That They Are Unable to Recover Their Costs from Internet Calls Are Unpersuasive

The claims of Ameritech and other ILECs that their alleged difficulty in recovering their costs from internet callers should excuse them from paying inter-carrier compensation are wholly unconvincing. Ameritech contends, for example, that it -- and presumably other ILECs -- are unable to recover the costs of internet usage by callers subscribing to second residential lines. If that were true, then it is unexplained why ILECs have so persistently promoted the sale of such lines. But in fact, there is little reason to credit Ameritech's cost analysis. As just one example, the analysis relies on an average loop cost, taking no account whatsoever of the fact that the incremental cost of installing a second residential line in most locations is extremely low.

Even if the ILECs could show economic losses caused by internet traffic, the logical response to such losses would be to increase end user rates for such traffic so as to cover costs, not to seek a special exemption from the established system of inter-carrier compensation. AT&T at 12; Time Warner at 10-11. As the Commission has stated:

> To the extent that some intrastate rate structures fail to compensate incumbent LECs adequately for providing service to customers with high volumes of incoming calls, incumbent LECs may address their concerns to state regulators.

Access Charge Reform Order, ¶ 376.

In this connection, the Commission must recognize that, while the internet may be stimulating new and unanticipated patterns of usage of the public network, it is the internet itself, not CLECs or their customers, that is responsible for generating such new patterns of usage. Any pressure on rates or network congestion that is caused by internet usage would be generated with or without the presence of CLECs. Indeed, if there were no CLECs be generated with or without the presence of CLECs. Indeed, if there were no CLECs, ILECs would have to build adequate facilities to terminate ISP-bound traffic. Thus, the presence of CLECs actually reduces the pressure on ILECs. Global NAPS at 3-5. Whatever the necessity to raise rates to end users in order to ensure cost recovery by the originating LEC, there is no justification for depriving terminating LECs of compensation for their costs in accordance with the applicable model of end user pricing. Such compensation is especially necessary because, as a number of parties demonstrate, the terminating LEC is able to relieve the originating LEC of substantial costs associated with terminating traffic to ISPs.

CONCLUSION

The Commission should act quickly to prescribe inter-carrier compensation rates based on existing TELRIC-based reciprocal compensation rates for local traffic.

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CERTIFICATE OF SERVICE

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